

The opinion in support of the decision being entered today is not
binding precedent of the Board.

Paper 78

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

SHUNONG YANG, WILLIAM F. McCOY,
and
ANTHONY W. DALLMIER
Junior Party
(Patent 6,287,473 B1),

v.

ROBERT M. MOORE
and
CHRISTOPHER J. NALEPA
Senior Party
(Application 09/785,890).

Patent Interference No. 105,230

Before SCHAFFER, DELMENDO, and MOORE, Administrative Patent
Judges.

DELMENDO, Administrative Patent Judge.

Decision - Rehearing - Bd. R. 125(c) (Including
Recommendation to Examiner - Bd. R. 127(c))

Exhibit B

Party Moore requests rehearing of (1) our September 29, 2005 judgment (paper 76) and (2) our September 13, 2005 decision on Moore's preliminary motion 2 (paper 73, hereinafter "PM2"). (Moore Request for Rehearing of the
5 Judgment filed October 31, 2005, paper 77; Moore Request for Rehearing of the Decision on Moore Preliminary Motion 2 filed September 28, 2005, paper 75.)

By way of background, we granted Moore's PM2 because Moore satisfied the burden of proving that all of party
10 Yang's involved claims (i.e., claims 1-13 of United States patent 6,287,473 B1) are unpatentable under 35 U.S.C. §§ 102 and 103 as either anticipated by or obvious over certain prior art. (September 13, 2005 decision at 30-50.)
However, we also held that Moore did not adequately rebut
15 the presumption under 37 CFR § 41.207(c) that all of its involved claims (i.e., claims 6-10 of United States application 09/785,890) are unpatentable over the same prior art applied against Yang's involved claims. (September 13, 2005 decision at 50-55.) Further, we denied Moore's
20 preliminary motion 3, which asserted that Yang's involved claims 1-13 fail to comply with the enablement requirement of 35 U.S.C. § 112, ¶1. (September 13, 2005 at 20-30.)

Moore does not challenge our decision with respect to preliminary motion 2 as it applies to Yang's involved claims
25 or to preliminary motion 3. Instead, Moore requests a

limited rehearing focusing on our holding that Moore failed to rebut the 37 CFR § 41.207(c) presumption of unpatentability of all of its involved claims over the same prior art urged against opponent Yang's unpatentable
5 involved claims.

According to Moore, we misapprehended the scope of the presumption under 37 CFR § 41.207(c) and "placed a burden on Moore to rebut prior art which was not cited by Moore in Preliminary Motion 2..." (Request for Rehearing of the
10 Decision on Moore PM2 at 2.) Moore urges that we "should send the application back to the Examiner with instructions to determine whether the evidence of record (in its entirety) suggests that a new rejection of Moore's involved claims is warranted." (Id. at 10.) Moore further
15 recommends that we render priority judgment in its favor. (Id. at 10-11.)

We grant Moore's request for rehearing in part as follows:

1. While we do not necessarily agree with Moore's
20 view that merely pointing out possible differences between the subject matter of its involved claims and the closest prior art (United States patent 3,558,503 issued to Goodenough et al. on January 26, 1971, hereinafter "Goodenough," Exhibit 1003)

rebutts a presumption of unpatentability,¹ we nevertheless return Moore's involved application to the examiner with a recommendation to reject all of Moore's involved claims to safeguard Moore's procedural due process rights. See 37 CFR 41.127(c).

2. We decline to award judgment in favor of Moore because neither party's involved claims are patentable over the prior art and, therefore, it is inappropriate to proceed to the priority phase where a count cannot be formulated.

¹ In PM2, Moore alleged that its involved claims call for "a composition defined by all of the species formed by adding bromine chloride to an alkali sulfamate solution" and that "[n]one of the prior art references cited against claims in the Yang '473 patent describe a bromine-based biocide prepared by adding bromine chloride to an overbased, alkali metal sulfamate solution formed from water, sulfamic acid and alkali metal base, and cooling the solution." (PM2 at 15.) Even assuming that the recited process steps result in a new final product, differences between the claimed invention and the closest prior art constitute only one of several factors in assessing patentability. According to the United States Supreme Court, the question of whether a claim would have been obvious (i.e., unpatentable over the prior art) depends on at least four underlying factual inquiries: (1) the scope and content of the prior art; (2) differences between the prior art and the claims at issue; (3) the level of ordinary skill in the pertinent art; and (4) evaluation of any relevant secondary considerations. See Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 17, 148

37 CFR § 41.127(c) RECOMMENDATION FOR FURTHER
ACTION BY EXAMINER

I. Relevant Regulation Authorizing Recommendation

5 37 CFR § 41.127(c) provides:

 (c) *Recommendation*. The judgment may include
a recommendation for further action by the
examiner or by the Director. If the Board
recommends rejection of a claim of an involved
10 application, the examiner must enter and maintain
the recommended rejection unless an amendment or
showing of facts not previously of record is filed
which, in the opinion of the examiner, overcomes
15 the recommended rejection. [Underscoring added.]

 We recommend that the examiner enter and maintain a new
ground of rejection based on the following findings of fact
(FF) and conclusions of law.

20 II. Findings of Fact

 1. Moore's claims 6-10 read as follows:

 6. A stabilized, bromine-based biocide
prepared by adding bromine chloride to an
overbased, alkali metal sulfamate solution
25 formed from water, sulfamic acid and alkali
metal base, and cooling the solution.

 7. The stabilized, bromine-based
biocide of Claim 6 wherein the process
30 includes the step of cooling the solution so
that the temperature is from about 25°C to
about 40°C.

 8. The stabilized, bromine-based
biocide of Claim 6 wherein the pH of the
35 solution is from about 13.0 to about 13.7.

 9. The stabilized, bromine-based
biocide of Claim 6, wherein the process

USPQ 459 (1966). Moore did not address all of these factors
in rebuttal of the presumption.

includes the step of adding bromine chloride in sufficient amount to obtain an active bromine content of at least about 100,000 PPM (wt/wt) and the atom ratio of nitrogen to active bromine is greater than 0.93.

10. A method for control of bacteria, algae and mollusks in a water system comprising introducing in the system the stabilized, bromine-based biocide of Claim 1.

2. Moore's '890 application was filed on February 16, 2001 as a continuation of application 09/451,344 filed on November 30, 1999, which is a continuation-in-part of application 09/442,025 filed on November 17, 1999 (now United States patent 6,306,441 issued on October 23, 2001), which in turn is a continuation-in-part of application 09/088,300 filed on June 1, 1998 (now United States patent 6,068,861 issued on May 30, 2000).

3. The '890 specification does not expressly define the term "stabilized, bromine-based biocide" recited in Moore's claims.

4. The '890 specification uses the term "concentrated stabilized liquid biocide formulation[]," "aqueous biocidal composition," or "concentrated stabilized biocidal composition" to refer to a liquid or aqueous solution containing the biocidal bromine compound. (Page 8, lines 8-17; claim 1.)

5. In discussing the prior art, the '890 specification identifies molecular bromine chloride as a "single-feed, bromine-based biocide." (Page 1, lines 21-22.)

5 6. With respect to the recitation "wherein the pH of the solution is from about 13.0 to about 13.7" in claim 8, the '890 specification makes it clear to one skilled in the relevant art that "solution" refers to the "overbased alkali metal sulfamate solution." (Specification at 9, lines 20-21.)

10 7. Goodenough discloses aqueous bromine solutions with bromine values of about 0.01 to about 100,000 ppmw useful for bleaching processes, treatment of swimming pool water, and disinfection. (Column 1, lines 13-61.)

15 8. Specifically, Goodenough teaches solutions made by a process comprising providing an aqueous solution of bromine and contacting therewith, either successively or simultaneously, a bromine value stabilizer (e.g., sulfamic acid) and an amount of hydroxide additive (e.g., magnesium hydroxide) sufficient to achieve a final pH in the system ranging from about 8 to about 10. (Column 2, lines 1-40.)

9. Additionally, Goodenough teaches that the bromide solutions to be treated by the disclosed process may further contain chlorides in the form of brine solution such as sodium chloride or calcium chloride. (Column 2, lines 16-22.)
10. Goodenough also discloses that the molar ratio of bromine to nitrogen ($\text{Br}_2:\text{N}_2$) is from about 2 to about 0.5, which would have indicated to one of ordinary skill in the art that the atomic ratio of nitrogen to active bromine ($\text{N}:\text{Br}$) is from about 0.5 to about 2. (Column 1, lines 66-69.)
11. Goodenough further teaches a Solution A "prepared by admixing 6.05 grams of sulfamic acid with about 500 grams of water, followed by addition of about 3.65 grams of magnesium hydroxide and about 5 grams of bromine." (Example 3, column 4, lines 66-69.)
12. Moore's expert, B. Gary McKinnie, Ph.D, states that the reaction disclosed in Goodenough would be exothermic. (Exhibit 1001, ¶¶14, 102.)
13. Goodenough states that the final solution was placed in a brown ultraviolet light-screening bottle for about 4 days, thus indicating to one of ordinary skill in the art that cooling occurred. (Column 5, lines 1-5.)

14. The Second Declaration of B. Gary McKinnie

(Moore's expert) (Exhibit 1073, ¶¶4 and 6) reads:

4. In 2000 as part of my research duties at Albermarle I personally conducted lab experiments to determine the N-halo compound make-up (specifically, the presence of N-bromosulfamate and N-chlorosulfamate) of a biocide solution which results from adding bromine chloride (pre-prepared or made inline) to an aqueous alkali metal sulfamate solution formed from water, sulfamic acid and sodium hydroxide (an alkali metal base). I also experimented adding bromine first, then chlorine, to the same aqueous alkali metal sulfamate solution.

6. When the pH of the aqueous alkali metal sulfamate solution prior to bromine chloride addition has a pH above 13, and upon simultaneous addition of bromine chloride with sodium hydroxide in order to maintain the pH above 13, only about 80 mole % of the N-halo sulfamate compound formed was N-bromosulfamate. The remaining about 20 mole % N-halo compound formed was N-chlorosulfamate. Similar results were achieved regardless of whether the bromine chloride was pre-prepared or made inline.

15. Jack F. Mills & John A. Schneider, "Bromine Chloride: an Alternative to Bromine," 12 Ind. Eng. Chem. Prod. Res. Develop. 160-165, no. 3 (1973)

(Exhibit 2014, hereinafter "Mills paper") states that bromine chloride and bromine are interchangeable brominating agents and that the former offers, inter alia, important cost and ecological advantages. (Mills paper at 160.)

16. Based on the disclosure in the Mills paper, Dr. Jack Mills (one of Yang's experts) states that the

"substitution of bromine chloride for bromine [in Moore's claims would have been] obvious [to a person having ordinary skill in the art]."

(Exhibit 2021, ¶¶43-104.)

- 5 17. Dr. Shunong Yang, one of the named inventors of the Yang '473 patent, testifies that "substitution of bromine chloride for bromine is obvious."

(Exhibit 2022, ¶86.)

- 10 18. Moore's expert, Dr. McKinnie, has stated that, based on his calculations, the pH of the aqueous alkali sulfamate solution in Goodenough's Example 3 would be "around 13.9." (Declaration of B. Gary McKinnie Exhibit 1001, ¶106.)

- 15 19. Dr. Yang avers that it would have been well known to a person having ordinary skill in the art, at the time of filing of Moore's '890 application, to provide an initial solution as set forth in Moore's claimed subject matter with a pH between 13 and 14 to maintain the storage stability of the resulting product. (Exhibit 2022, ¶97.)
- 20

- 25 20. Dr. John A. Wojtowicz (one of Yang's expert) also states that it would have been well known to a person having ordinary skill in the art, at the time of filing of Moore's '890 application, to provide an initial solution as set forth in

Moore's claimed subject matter with a pH between 13 and 14 to maintain the storage stability of the resulting product. (Exhibit 2023, ¶97.)

5 III. DISCUSSION

Moore's involved claims (claims 6-10 of application 09/785,890) should be rejected under 35 U.S.C. § 102(b) or 103(a) as unpatentable over Goodenough (Exhibit 1003) alone or Goodenough in view of facts found in Exhibits 1001, 1073,
10 2014, 2021, 2022, and 2023.

An analysis of whether a claim is unpatentable over the prior art must include a meaningful construction of the claim as to its scope. Gechter v. Davidson, 116 F.3d 1454, 1457, 1460 n.3, 43 USPQ2d 1030, 1032, 1035 n.3 (Fed. Cir. 1997); In re Paulsen, 30 F.3d 1475, 1479, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994). In construing unpatented claims, the United States Patent and Trademark Office (PTO) is obligated to give a disputed claim term its broadest reasonable interpretation, taking into account any enlightenment by way
20 of definitions or otherwise found in the specification. 37 CFR § 41.200(b); In re Bigio, 381 F.3d 1320, 1324, 72 USPQ2d 1209, 1211 (Fed. Cir. 2004) ("[T]he PTO gives a disputed claim term its broadest reasonable interpretation during patent prosecution."); In re Morris, 127 F.3d 1048, 1054, 44
25 USPQ2d 1023, 1027 (Fed. Cir. 1997) ("[T]he PTO applies to the

verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill.").

Moore's involved claims are directed to a "stabilized,
5 bromine-based biocide" (claims 6-9) and to a "method for control of bacteria, algae and mollusks in a water system comprising introducing in [sic, into] the system the stabilized, bromine-based biocide of Claim 1 [sic, claim 6]" (claim 10). The '890 specification does not expressly
10 define the term "stabilized, bromine-based biocide" recited in Moore's claims. (FF3.) However, the '890 specification uses the term "concentrated stabilized liquid biocide formulation[]," "aqueous biocidal composition," or "concentrated stabilized biocidal composition" to refer to a
15 liquid or aqueous solution containing the biocidal bromine compound. (FF4; page 8, lines 8-17; claim 1.) Furthermore, in discussing the prior art, the '890 specification identifies molecular bromine chloride as a "single-feed, bromine-based biocide." (FF5; page 1, lines 21-22.)
20 Consistent with the way in which terms are used in the '890 specification, we construe the term "stabilized, bromine-based biocide" recited in Moore's claims to mean the bromine compound resulting from the recited steps, not the resulting aqueous formulation or solution containing the bromine
25 compound. Thus, contrary to Moore's allegation (PM2 at 15),

the claimed "stabilized, bromine-based biocide" is not directed to "a composition which is defined by all of the species formed by adding bromine chloride to an alkali metal sulfamate solution" (emphasis added).

5 As discussed in our September 13, 2005 decision (decision at 52), Moore's claims 6-9 are "product-by-process" claims. As has been correctly argued by Moore against Yang's unpatentable claims, the patentability of "product-by-process" claims depends on the claimed product
10 ("stabilized, bromine-based biocide"), not on the process steps recited in the claims. See, e.g., In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985).

With respect to the recitation "wherein the pH of the solution is from about 13.0 to about 13.7" in claim 8, the
15 '890 specification makes it clear to one skilled in the relevant art that "solution" refers to the "overbased alkali metal sulfamate solution." (FF6; specification at 9, lines 20-21.)

Having construed Moore's claims, we turn to the
20 evidence. Goodenough discloses aqueous bromine solutions with bromine values of about 0.01 to about 100,000 ppmw useful for bleaching processes, treatment of swimming pool water, and disinfection. (FF7; column 1, lines 13-61.) Specifically, Goodenough teaches solutions made by a process
25 comprising providing an aqueous solution of bromine and

contacting therewith, either successively or simultaneously,
a bromine value stabilizer (e.g., sulfamic acid) and an
amount of hydroxide additive (e.g., magnesium hydroxide)
sufficient to achieve a final pH in the system ranging from
5 about 8 to about 10. (FF8; column 2, lines 1-40.)

Additionally, Goodenough teaches that the bromide solutions
to be treated by the disclosed process may further contain
chlorides in the form of brine solution such as sodium
chloride or calcium chloride. (FF9; column 2, lines 16-22.)

10 According to Moore's own expert, Dr. McKinnie, the reaction
described in Goodenough would be exothermic. (FF12; Exhibit
1001, ¶¶14, 102.) Goodenough also discloses that the molar
ratio of bromine to nitrogen ($\text{Br}_2:\text{N}_2$) is from about 2 to
about 0.5, which would have indicated to one of ordinary
15 skill in the art that the atomic ratio of nitrogen to active
bromine ($\text{N}:\text{Br}$) is from about 0.5 to about 2. (FF10; column
1, lines 66-69.) Goodenough further teaches a Solution A
"prepared by admixing 6.05 grams of sulfamic acid with about
500 grams of water, followed by addition of about 3.65 grams
20 of magnesium hydroxide and about 5 grams of bromine."

(FF11; example 3, column 4, lines 66-69.) Goodenough states
the solution was placed in a brown ultraviolet light-
screening bottle for about 4 days, thus indicating to one of
ordinary skill in the art (based on the exothermic nature of
25 the reaction disclosed in the Goodenough) that cooling

occurred. (FF12 and FF13; column 5, lines 1-5; Exhibit 1001, ¶¶14, 102.)

Given the close similarities between the preparation processes and starting materials recited in Moore's claim 6 and the prior art, it is reasonable to conclude that the claimed "stabilized, bromine-based biocide" and the stable prior art final bromine compound as described in Goodenough are essentially the same. In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990) ("[W]e conclude that the Board correctly found that the virtual identity of monomers and procedures sufficed to support a prima facie case of unpatentability of Spada's polymer latexes for lack of novelty."); In re Thorpe, 777 F.2d at 697, 227 USPQ at 966 ("[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself.").

Thus, the evidence of record supports a prima facie case of unpatentability against Moore's involved claims.

Moore seems to be alleging that the use of bromine chloride in lieu of bromine results in a nonobvious difference. (Request for rehearing of the decision on Moore PM2 at 5-6, referring to Moore Opposition 1 at 10-15.) Specifically, Moore argues (Moore Opposition at 11):

[W]hen the bromine chloride is added to an alkali metal sulfamate solution which has a pH above 13, as recited for example, in claim 8 of Moore's '890 application, only about 80 mole% of

the N-halo sulfamate compound formed is N-bromosulfamate, and about 20 mole% N-halo compound formed is N-chlorosulfamate. Fact 33. Therefore, the biocide which is the subject matter of Moore's claims further differs from the immediate product produced according to the process steps recited in Count 1 of the '222 interference by comprising N-chlorosulfamate.

10 In support of this contention, Moore relies on the Second Declaration of B. Gary McKinnie (Moore's expert) (Exhibit 1073) at 4 and 6 (FF14):

15 4. In 2000 as part of my research duties at Albermarle I personally conducted lab experiments to determine the N-halo compound make-up (specifically, the presence of N-bromosulfamate and N-chlorosulfamate) of a biocide solution which results from adding bromine chloride (pre-prepared or made inline) to an aqueous alkali metal
20 sulfamate solution formed from water, sulfamic acid and sodium hydroxide (an alkali metal base). I also experimented adding bromine first, then chlorine, to the same aqueous alkali metal sulfamate solution.

25 ****

30 6. When the pH of the aqueous alkali metal sulfamate solution prior to bromine chloride addition has a pH above 13, and upon simultaneous addition of bromine chloride with sodium hydroxide in order to maintain the pH above 13, only about 80 mole % of the N-halo sulfamate compound formed was N-bromosulfamate. The remaining about 20 mole % N-halo compound formed was N-chlorosulfamate. Similar results were achieved regardless of
35 whether the bromine chloride was pre-prepared or made inline.

This contention is without merit for a number of reasons. First, Moore's claim 6, the independent claim,
40 does not recite any pH values. Second, Moore's claims do not call for a composition of compounds or mixture of N-halo compounds but instead are directed to any "stabilized,

bromine-based biocide" that is formed by the recited process steps. Third, nowhere does Moore point to any experimental evidence establishing any difference, let alone a patentable difference, between a biocide within the scope of Moore's
5 claim 6 and Goodenough's final bromine compound where sodium chloride or calcium chloride is used as a starting material in conjunction with bromine.

Even assuming that some difference results by practicing the process recited in Moore's product claims,
10 Moore has not shown that this difference in the preparation process results in a product (claims 6 and 7) different from Goodenough's product. According to Jack F. Mills & John A. Schneider, "Bromine Chloride: an Alternative to Bromine," 12
Ind. Eng. Chem. Prod. Res. Develop. 160-165, no. 3 (1973)
15 (Exhibit 2014, "Mills paper"), bromine chloride and bromine are interchangeable brominating agents and the former offers, inter alia, important cost and ecological advantages. (FF15; Mills paper at 160.) Thus, one of
ordinary skill in the art would have been led to substitute
20 Goodenough's bromine with bromine chloride with a reasonable expectation that these reactants would be interchangeable as bromine sources in the production of bromine-based biocides and that bromine chloride would provide advantages over
bromine. This conclusion is consistent with: (1) Dr.
25 Mills's declaration, which based on the teachings of the

Mills paper, declares that the "substitution of bromine chloride for bromine [in Moore's claims would have been] obvious [to a person having ordinary skill in the art]" (FF16; Exhibit 2021, ¶¶47, 69-81) as well as (2) Dr. Yang's testimony, which also states that "substitution of bromine chloride for bromine is obvious" (FF17; Exhibit 2022, ¶86).²

With respect to Moore's claim 8, which recites a solution pH of about 13.0 to about 13.7, Moore's expert, Dr. McKinnie, has calculated that the pH of the aqueous alkali sulfamate solution in Goodenough's Example 3 would be "around 13.9." (FF18; Declaration of B. Gary McKinnie Exhibit 1001, ¶106.) The phrase "pH of...about 13.7" in Moore's claim 8 reads on or would have been prima facie obvious over Goodenough's pH of "around 13.9." Titanium Metals Corp. v. Banner, 778 F.2d 775, 783, 227 USPQ 773, 779 (Fed. Cir. 1985). Furthermore, Drs. Yang and Wojtowicz both aver that it would have been well known to a person having ordinary skill in the art, at the time of filing of Moore's '890 application, to provide an initial solution as set forth in Moore's claimed subject matter with a pH between 13 and 14, which encompasses the claimed range, to maintain the storage stability of the resulting product. (FF19-20;

² Cf. Mazzari v. Rogan, 323 F.3d 1000, 1003, 1005, 66 USQ2d 1049, 1051, 1053 (Fed. Cir. 2003) (affirming district court's summary judgment on obviousness in favor of the PTO based on evidence including an expert declaration opining

Exhibit 2022, ¶97; Exhibit 2023, ¶97.) Thus, one of ordinary skill in the art would have found it obvious to raise the pH of Goodenough's solution to about 13, thus arriving at Moore's claimed product, in order to maintain storage stability.

The subject matter of Moore's claim 9, which recites an active bromine content of "at least about 100,000 PPM (wt/wt)" and an atomic ratio of nitrogen to active bromine of "greater than 0.93," would also have been obvious to a person having ordinary skill in the art because the prior art ranges and the claimed ranges overlap. In re Peterson, 315 F.3d 1325, 1329-30, 65 USPQ2d 1379, 1382-83 (Fed. Cir. 2003); In re Geisler, 116 F.3d 1465, 1469, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997); In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990). This is because "[t]he normal desire of scientists or artisans to improve upon what is generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages. In re Peterson, 315 F.3d at 1330, 65 USPQ2d at 1382.

As to claim 10, one of ordinary skill in the art would have found the method of Moore's claim 10 obvious because Goodenough expressly teaches the use of the disclosed

that one of ordinary skill in the art would have found it obvious to combine two references).

composition for treatment of water systems. (FF7; column 1, lines 13-61.)

Moore argues that a 37 CFR § 41.207(c) recommendation would be inappropriate because we did not consider Moore's
5 arguments of record as to the nonobviousness of the use of bromine chloride over bromine. (Request for rehearing of the decision on PM2 at 8.) Moore is incorrect. We did consider Moore's arguments but did not find them sufficient.

Finally, Moore urges that we should require additional
10 briefs from both parties as to the unpatentability of Moore's involved claims. (Request for rehearing at 9-10.) Additional briefing is unnecessary. The voluminous evidence of record supports our view that Moore's claims are not patentable over the prior art.

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ORDER

For these reasons, it is:

ORDERED that we have instructed the examiner to enter
and maintain a rejection under 35 U.S.C. §§ 102 and 103 of
5 Moore's involved claims 6-10; and

FURTHER ORDERED that our September 13, 2005 decision on
preliminary motions and our September 29, 2005 judgment are
modified accordingly.³

It is FURTHER ORDERED that Moore's application
10 09/785,890 is returned to the jurisdiction of the
Commissioner of Patents for action not inconsistent with the
opinion. 37 CFR § 41.103.

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³ Except as modified herein, all aspects of our
September 13, 2005 decision and our September 29, 2005
judgment are in force.

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10

/Richard E. Schafer/)
RICHARD E. SCHAFER)
Administrative Patent Judge)

15

/Romulo H. Delmendo/)
ROMULO H. DELMENDO)
Administrative Patent Judge)

BOARD OF PATENT

APPEALS AND

20

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